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Supreme Court, U.S.
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**DOCKET NUMBER:** _____

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**IN THE SUPREME COURT**
**OF THE UNITED STATES OF AMERICA**

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**OCTOBER 1997 TERM**

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**EDWARD KEITH TINDOL**
*Petitioner,*

**VS.**

**THE STATE OF TEXAS**
*Respondent.*

---

**"ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS"**

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# PETITION FOR WRIT OF CERTIORARI

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**Justin W. Low;**
**Attorney for**
**Petitioner**
**1400 N. Grandview**
**Odessa, Texas 79761**
**(915) 550-8087**

40pp

## QUESTION PRESENTED

**IS A CITIZEN'S RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION VIOLATED WHEN A STATE ARBITRARILY DENIES HIM RIGHTS GUARNTEED TO HIM BY THE LAWS OF THAT STATE?**

## PARTIES IN PROCEEDINGS BELOW

Edward Keith Tindol
Represented by:

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Odessa, TX 79761

State of Texas
Represented by:

State Prosecuting Attorney
P. O. Box 12405
Austin, TX 78711

Mr. Russell Malm
Midland County
District Attorney's Office
200 W. Wall
Midland, TX 79701

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## JURISDICTIONAL STATEMENT

The order to be reviewed is the order of the Court of Appeals, Eighth District of Texas, docket number 08-97-00055CR, dated November 13, 1997.

The Texas Court of Criminal Appeals denied Petitioner's Petition for Discretionary review and Motion for Re-hearing thereon on April 2, 1998.

28 U.S.C. 1257 confers jurisdiction on this Court.

## APPLICABLE CONSTITUTIONAL PROVISIONS

This case involves section one of the fourteenth amendment of the United States Constitution which provides: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall nay State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws."

## STATEMENT OF THE CASE

Petitioner was convicted of the offense of Theft and placed on community supervision of a period of five years. The State of Texas later filed a Motion to Revoke Community Supervision, Petitioner plead not true to all allegations, and a hearing was held in the 238 District Court, Midland County, Texas, after which Petitioner was sentenced to five years imprisonment in the Texas Department of Criminal Justice. Petitioner appealed the conviction to the Court of Appeals for the Eighth Judicial District on two grounds, both of which were based on evidentiary insufficiency.

The Eighth Court of Appeals reviewed the case in a light most favorable to the State. (See Appendix A, Pg. 3). Although such a review is consistent with the standard set forth by this Court in Jackson v. Virginia, 443 U.S. 307, 319 (1979), Texas law requires that an appellate court must review a question of sufficiency of the evidence in a neutral light "without the prism of the light most favorable to the

prosecution." See Clewis v. State, 922 S.W.2d 126 (Tex. Crim. App. 1996).

A Petition for Discretionary Review was filed in the Texas Court of Criminal Appeals, however, the Court refused the petition. (See Appendix B). Petitioner filed a Motion for Rehearing in the Court of Criminal Appeals and said motion was denied on April 2, 1998. (See Appendix C).

The Motion for Re-hearing on the Petition of Discretionary Review in the Texas Court of Criminal Appeals made clear that the Eighth Court of Appeals had applied an improper standard of review. (See Appendix D, Pg. 8, 9).

**PETITIONER'S RIGHT TO DUE PROCESS OF LAW AS PROVIDED BY THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION WAS VIOLATED WHEN THE STATE OF TEXAS ARBITRARILY DENIED HIM RIGHTS GUARANTEED HIM BY TEXAS LAW WHEN IT FAILED TO APPLY THE PROPER STANDARD OF REVIEW ON HIS APPEAL.**

Congress has acted within its constitutional authority to "'interpose the federal courts between the States and the people, as guardians of the people's federal rights -- to protect the people from unconstitutional action,'" *Reed v. Ross*, 468 U.S. 1, 10, (1984), *quoting Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

Once a state has conferred a right upon its citizens, the state's arbitrary denial of such right to a citizen is a deprivation of due process of law and violation of the due process clause of the 14th amendment of the United States Constitution. See e.g. Hicks v. Oklahoma, 447 U.S. 343, 346 n. 3 (1980); Williams v.

Oklahoma City, 395 U.S. 458, 459 (1969); Griffin v. Illinois, 351 U.S. 12, 16-18 (1956).

Texas law provides that an appellate review of the factual sufficiency of the evidence by a Texas Court should be done in an impartial manner and not in "a light most favorable to the State." Clewis v. State, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996); accord Cain v. State, 958 S.W.2d 404 (Tex. Crim. App. 1998). Although federal law provides that due process is satisfied if a court conducts an appellate review "in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," Jackson v. Virginia, 443 U.S. 307, 319 (1979), this is the minimum protection required to satisfy due process and Texas law may provide greater protection. See Cooper v. California, 386 U.S. 58 (1967). On the issue of appellate review of factual sufficiency, Texas law does provide greater protection to a criminal defendant in its requirement that a criminal defendant is entitled to have his case reviewed on

factual sufficiency grounds "without the prism of in the light most favorable to the prosecution." Clewis, 922 S.W.2d at 129.

Once the State has established avenues of appellate review, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the Courts. See Williams, 395 U.S. at 459. Although the State of Texas is not required to provide the higher standard of review provided for in Clewis, once the State has established the right to such a review it cannot justifiably deny Petitioner such a review without violating the due process clause of the 14th amendment of the United States Constitution. See Williams, 395 U.S. at 459.

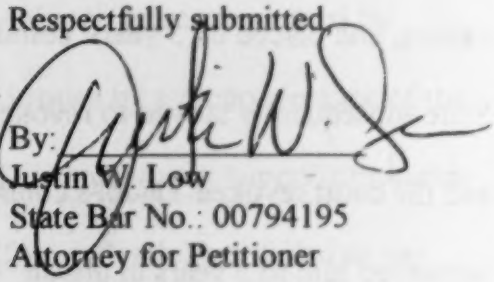
In the instant case, the Eight Court of Appeals expressly applied the Jackson standard of review and not the Clewis standard in direct contravention of established Texas law. (See Appendix A at P. 3). The Texas Court of Criminal Appeals has ratified the actions of the Eight Circuit Court, thus the highest Court in the State of Texas has acted. Because the State of Texas had established the right to a factual sufficiency review

without the prisim of the light most favorable to the prosecution as provided for by Clewis, Petitioner was entitled to have his case reviewed pursuant to the Clewis standard because Texas Law provided for such a right. Williams, 395 U.S. at 459; accord Hicks, 447 U.S. at 346 n. 3. The Eighth Court of appeals applied the wrong standard of review to the Petitioner's case and the Texas Court of Criminal Appeals, the highest Court of the State of Texas, implicitly approved the application of the improper standard when it denied Petitioner's Petition for Discretionary Review. The State of Texas failed to provide Petitioner all the protections provided for under established Texas law when an improper standard of appellate review was applied to the Petitioner's case, thus, Petitioner's right to due process of law as provided for under the 14th amendment was thereby violated. See e.g. Ross v. Oklahoma, 487 U.S. 81, 88-89 (1988); Hicks, 447 U.S. at 346 n. 3; Williams, 395 U.S. at 459.

## PRAYER

WHEREFORE PREMISES CONSIDERED, Petitioner prays that this Honorable Court grant this Petition for Certiorari and allow Petitioner to brief the merits of the herein contained issues, after which, this Court should hear oral argument on the said issues and reverse the decesion of the Texas Courts and remand this case for proceedings consistent with the opinions of this Court. Petitioner prays for any other relief, specific or general, at law or in equity, to which he may show himself justly entitled and for which he shall forever pray.

Respectfully submitted,



By:
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COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

| | | |
|---|---|---|
| EDWARD KEITH TINDOL, | ) | |
| | ) | No. 08-97-00055-CR |
| Appellant, | ) | |
| | ) | Appeal from |
| v. | ) | |
| | ) | 238th District Court of |
| THE STATE OF TEXAS, | ) | |
| | ) | Midland County, Texas |
| Appellee, | ) | |
| | ) | (TC# CRB-19,298) |

## OPINION

Edward Keith Tindol was found guilty of forgery by passing and placed on 5 years' community supervision. The State subsequently moved to revoke community supervision, and the court revoked Tindol's community supervision and sentenced him to 5 years in prison. This appeal followed. We affirm.

On March 9, 1994, Tindol was adjudged guilty of forgery by passing, a third-degree felony, and placed on five years' probation, ordered to pay $55 a month in restitution and fees, and perform 160 hours of community service. On

September 20, 1996, the State filed a First Amended Motion to Revoke Community Supervision, alleging that Tindol had (1) failed to perform community service, (2) failed to pay certain of his monthly assessments and was $269 in arrears, and (3) issued and passed several bad checks.

The trial court found that Tindol was approximately $269 delinquent in this monthly assessments and that he had issued and passed nine bad checks. The trial court revoked Tindol's community supervision and sentenced him to five years in prison.

Tindol now complains that the trial court erred by finding (1) that the State had proved by a preponderance of the evidence that he had violated his community supervision terms by issuing a bad check, and (2) that Tindol had failed to pay monthly probation and restitution fees because he had established that he was not able to make the payments.

On a motion to revoke community supervision, the State must prove by a preponderance of the evidence that the defendant violated a condition of community supervision,

*Garrett v. State*, 619 S.W.2d 172, 174 (Tex.Crim.App. [Panel Op.] 198 *1), also see, e.g., Taylor v. State*, 604 S.W.2d 175, 180 (Tex.Crim.App. [Panel Op.] 1980). Where the State alleges multiple violations of community supervision, the court may revoke community supervision if the State proves any one violation. *See Sanchez v. State*, 603 S.W.2d 869, 871 (Tex.Crim.App. [Panel Op.] 1980). We review the lower court's order revoking community supervision to determine whether the lower court abused its discretion. *Flournoy v. State*, 589 S.W.2d 705, 709 (Tex.Crim.App. [Panel Op.] 1979). We view the evidence for revocation in the light most favorable to the State. *Garrett*, 619 S.W.2d at 174. Once the State shows a violation of a community supervision term, the trial court's discretion to revoke, continue, or modify the defendant's community supervision is absolute and unreviewable. *Flournoy v. State, 589* S.W.2d at 707.

A person commits an offense if he issues or passes a check for the payment of money knowing that the issuer does not have sufficient funds in or on deposit with the bank for the

payment in full of the check as well as all other checks or orders outstanding at the time of issuance. TEX.PEN.CODE ANN. § 32.41(a)(Vemon l994). Although the State can establish the required knowledge by direct evidence, the law presumes the issuer's knowledge of insufficient funds if (1) the issuer had no account with the bank when he issued the check, or (2) the bank refused payment for lack of funds or insufficient fimds on presentation within thirty days after issue and the issuer failed to pay the holder in full within ten days after receiving prescribed notice of that refusal. TEX.PEN.CODE ANN. § 32.41(b).

Mary Wheeler, who works with the district attorney's hot check office, testified that before that office accepts a returned check for collection, it requires proof that the merchant sent a certified letter to the check drawer maker requesting payment. All nine checks listed in the State's motion to revoke had been accepted by the hot check office. Ms. Wheeler also testified that after her office receives a check from a merchant, the office writes another letter to the

check drawer giving the drawer ten to fifteen more days to pay the check before the office proceeds to file charges. She confirmed that this procedure was followed in all nine checks listed in the motion.

She further testified that she spoke with Tindol often about the checks. She testified further that Tindol had told her that he issued and passed all the nine checks. She stated that her

office had not received payment on any of the checks. She could not recall Tindol telling her that he did not realize the checks were bad when he wrote them or that he did not know the account was closed when he wrote the checks. She further testified that she had been in contact with Tindol over a two-year period in connection with other checks.

Tindol testified that he had been partners in the restaurant business with a Walter Jones. He testified the checks were bad because Jones had stolen funds that he should have deposited into the checking account. On cross-examination, he stated that the restaurant checking account was opened in

November 1994 and that his partner stole the money from January to March 1995 when the partnership ended. He testified he closed the restaurant in May 1995 but that the books remained open for some four months to collect pending credit card payments.

When asked if he knew the balance in the bank account on April 3, 1995, when he wrote a $323.23 check to Susan Armendarez, stamped "INSUFFICIENT," (check "c" in the State's motion), he said, "I would have to refer back to records. I cannot state one way or the other, because there were a lot of factors involved."

When the State asked him about check No. 1148, written to Wal-Mart on May 26, 1995, for $149.40, stamped "ACCOUNT CLOSED" "INSUFFICIENT," (check "b" in the State's motion), he said he did not pass or write that check but that he had merely signed the check and someone else had passed it. He said it was his practice to sign checks and to leave them available for the restaurant. He also said the check might have been used to purchase seafood.

When asked about check No. 1397 written to Sam's on July 27, 1995, $20.72, stamped c4ACCOUNT CLOSED," (check "a" in the State's motion), he stated, "I couldn't answer that question. I don't know. That's been some time ago. I do not recall when the account was closed, so therefore I could not testify to that."

When asked about check No. 1382, dated July 1, 1995, to Colortyme for $68.00, stamped "ACCOUNT CLOSED," (check "d" in the State's motion), he said when he wrote the check he thought the account was open. "Again I could be wrong," he said.

The State then asked him about check No. 1072, dated April 18, 1995, for $295.98 to Culligan, stamped "INSUFFICIENT," (check "e" in the State's motion). He said he thought it was a good check but that he did not remember whether he or whether his accountant had the business's bank records at that time. As for check No. 10, dated March 24, 1995, to Sam's for $167.73, stamped "INSUFFICIENT" (check "f' in the State's motion), he testified that he had written the

check. He said, "I felt it was good, but I didn't know." He said that also applied to check No. 21, dated March 28, 1995, also to Sam's for $164.62, stamped "INSUFFICIENT" (check "g" in the State's motion).

Tindol stated that he did not know his balance when he wrote check No. 1012, dated April 7, 1995, to Sam's for $149.62, stamped "INSUFFICIENT," (check "h" in the State's motion). Lastly, he averred that the writing on check No. 1392, dated August 2, 1995, to QuickSurance for $40, stamped "ACCOUNT CLOSED," (check "I" in the State's motion) was not his.

Tindol also testified that prior to trial, he had not been shown all nine checks. But Wheeler's testimony was that the merchants had given the prescribed notice to Tindol in connection with all nine checks. The trial court could therefore presume the required knowledge, and although Tindol offered evidence to rebut the presumption, the court may have disbelieved the evidence. Moreover, Wheeler testified that Tindol had told her that he had issued and passed all nine

checks. In connection with the required knowledge, Tindol testified that he thought certain checks were good. Elsewhere, he said he did not know whether certain checks were good or not. It is not unreasonable to construe knowledge from his contradictory answers. Finally, though he testified that he did not tell Wheeler that he issued and passed all nine checks, the trial court may have believed her testimony and disbelieved his.

Viewing the evidence in the light most favorable to the State, we cannot say the trial court abused its discretion in finding that the State had proved by a preponderance of the evidence that Tindol had issued and passed the nine hot checks. Having found that Tindol had violated a term of his community supervision, the trial court had the authority to revoke his community supervision. We therefore overrule Tindol's first point of error, and because we find the trial court was entitled to revoke community supervision on the basis of the hot check allegations, it is unnecessary to consider Tindol's second point. We affmn the trial court's order revoking probation.

November 13, 1997

/s/ David Wellington Chew
DAVID WELLINGTON CHEW,
Justice

Before Panel No. 2
Barajas, C.J., McClure, and Chew, JJ.

(Do Not Publish)

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

| | | |
|---|---|---|
| EDWARD KEITH TINDOL, | ) | |
| | ) | No. 08-97-00055-CR |
| Appellant, | ) | |
| | ) | Appeal from |
| vi. | ) | |
| | ) | 238th District Court of |
| THE STATE OF TEXAS, | ) | |
| | ) | Midland County, Texas |
| Appellee, | ) | |
| | ) | (TC# CRB-19,298) |

**JUDGMENT**

The Court has considered this cause on the record and concludes there was no error in the judgment. We therefore affirm the judgment of the court below. We further order Appellant to pay all costs of this appeal, in accordance with the opinion of this Court, and that this decision be certified below for observance.

IT IS SO ORDERED THIS 13TH DAY OF NOVEMBER, 1997.

/s/ David Wellington Chew
DAVID WELLINGTON CHEW, Justice

Before Panel No. 2
Barajas, C.J., McClure, and Chew, JJ.

OFFICIAL NOTICE FROM COURT OF CRIMINAL
APPEALS OF TEXAS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

February 25, 1998
COA#: 08-97-00055-CR
RE: Case No. 0017-98
STYLE: TINDOL, EDWARD KEITH

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Troy C. Bennett, Jr., Clerk

THOMAS S MORGAN
ATTORNEY AT LAW
415 WEST WALL #209
MIDLAND TX 79701-4410

OFFICIAL NOTICE FROM COURT OF CRIMINAL
APPEALS OF TEXAS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

April 1, 1998
COA#: 08-97-00055-CR
RE: Case No. 0017-98
STYLE: TINDOL, EDWARD KEITH

On this day, the Appellant's Motion for Rehearing was denied.

Troy C. Bennett, Jr., Clerk

JUSTIN W LOW
1400 N GRANDVIEW
ODESSA TX 79761

**NO: 0018-98**

**IN THE COURT OF CRIMINAL APPEALS**

**EDWARD KEITH TINDOL,**

***Appellant,***

**V.**

**THE STATE OF TEXAS,**

***Appellee.***

On Discretionary Review from an Opinion of the Court of Appeals for the Eighth Supreme Judicial District of Texas In Cause Number 08-97-00055-CR

# APPELLANT'S MOTION FOR REHEARING ON PETITION FOR DISCRETIONARY REVIEW

The Law Offices of
Justin W. Low
1400 N. Grandview
Odessa, Texas 79761
By: Justin W. Low
State Bar No.: 00794195
Attorney for Appellant

**NO: 0018-98**

**IN THE COURT OF CRIMINAL APPEALS**

**EDWARD KEITH TINDOL,**

***Appellant,***

**V.**

**THE STATE OF TEXAS,**

***Appellee.***

On Discretionary Review from an Opinion of the Court of Appeals for the Eighth Supreme Judicial District of Texas In Cause Number 08-97-00055-CR

**APPELLANT'S MOTION FOR REHEARING ON PETITION FOR DISCRETIONARY REVIEW**

TO THE HONORABLE JUSTICES OF THE COURT OF CRIMINAL APPEALS:

COMES NOW, Edward Keith Tindol, by and through his attorney of record who has in conjunction herewith filed a

motion for substitution of counsel, and makes and files this Motion for Rehearing on Petition for Discretionary of the above-styled and numbered cause pursuant to Rule 79 of the Texas Rules of Appellate Procedure, and in support thereof would respectfully show unto the honorable Court as follows:

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## STATEMENT OF THE CASE

Appellant was placed on community supervision for five years after pleading guilty to the feliny offense of Theft over $750.00 (R. I - 3-8). The State filed a First Amended Motion to Revoke Community Supervision, alleging four separate grounds of community supervision (R. I- 20-26). Appellant pled not true. The trial court found that the State proved two of the four alleged violations of community supervision (R. I - 32-40; R. II 93-95). Punishment was assessed at five years imprisonment (R. I- 32-40; R. II - 93-95).

## PROCEDURAL HISTORY OF THE CASE

The Court of Appeals for the Eighth Supreme Judicial District, El Paso, Texas, rendered its decision and delivered its opinion in this case on November 13, 1997, affirming the conviction. No Motion for Rehearing was filed and the Court of Appeals did not order an *en banc* reconsideration of the decision on its own motion. A Petition for Discretionary Review was filed in this Court on or about December 9, 1997. Petitioner for Discretionary Review was denied by this Court on February 25, 1998, and, a Motion for Rehearing is thus timely filed if filed on or before March 12, 1998.

## GROUNDS AND ARGUMENT FOR REHEARING

Appellant's Petition for Discretionary Review was filed on or about December 9, 1998. On December 18, 1998, this Court issued its opinion in *Cain v. State*, 958 S.W.2d 404; 1997 Tex. Crim. App. Lexis 113 (Tex. Crim. App. 1997), which is a substantial intervening circumstance which provides ground for rehearing pursuant to Rule 79.1-2 of the Texas Rules of Appellate Procedure for the reasons stated below.

Pursuant to Rule 66.3 (c) of the Texas Rules of Appellate Procedure and for the reasons set forth below, the court of appeals has decided an important question of state law in a way that conflicts with the applicable decisions of this Court.

*In Cain* this Court held that reversible error occurred where an appellate court, in a factual sufficiency review, failed to consider all the evidence impartially. *Cain, 1997* Tex. Crim. App. Lexis 113 at 19. In reviewing its decision in *Clewis v. State*, 922 S.W.2d 126 (Tex. Crim. App. 1996) this Court held that a factual sufficiency review by a court of appeals should be

done "without the prism of in the light most favorable to the prosecution." *Cain*, 1997 Tex. Crim. App. Lexis 113 at 7.

In the instant case the court of appeals reviewed the factual sufficiency point of error raised by appellant "in the light most favorable to the State." (Ct. App. Opinion P.2). Thus, the court of appeals clearly applied an improper standard of review to the decision of the trial court based on this Court's holding in *Cain*. The proper standard of review of the factual sufficiency issue should have been an impartial consideration of the evidence and not in a manner which is partial to the State. *See Cain*, 1997 Tex. Crim. App. Lexis 113 at 19. It was error for the court of appeals to apply an improper standard of review, and, given this Court's subsequent decision in *Cain*, justice requires that the issue be reconsidered in light of the holding of *Cain*.

The instant case was tried before the trial judge who by statute was the finder of fact. *See* Tex. Code Crim. P. art. 42.12 § 21 (Vernon 1996). Although *Cain* involved a factual sufficiency review of a jury verdict, there is no legitimate

reason that *Cain should* not apply to a factual sufficiency review in a situation where the trial judge sits as finder of fact such as in a hearing on a Motion to Revoke Community Supervision. This is especially true where the verdict is "so contrary to the overwhelming with of the evidence as to be clearly wrong and unjust." *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996).

As noted, a defendant is not entitled to a jury in a hearing on the State's Motion to Revoke Community Supervision and thus, the judge is the sits both as trier of fact and judge. *See* Tex. Code Crim. App. art. 42.12. § 21. Justice Campbell in his dissent in *Riggs v. State*, 745 S.W.2d 1, 11 (Tex. Crim. App. 1988) (Miller, J. joining) noted that the same standard of review should be applied to a judge or jury as trier of fact. This Court has implicitly held that in a non-jury trial the judge is in the same position as the jury as finder of fact. *See Mattias v. State*, 731 S.W.2d 936, 939-40 (Tex. Crim. App.1987). It is important to note that *Mattias* was written prior to this Court's opinion in *Clewis* and thus applies the

wrong standard for review of factual sufficiency issues. *Compare Ciewis, 922* S.W. 2d at 129 (holding that the proper standard of review "views all the evidence without the prism of 'in the light most favorable to the prosecution"); *with Mattias,* 731 S.W.2d at 939 (holding "where the sufficiency of the evidence to sustain the conviction is challenged is "in the light most favorable to the prosecution"). It is abundantly clear that the court of appeals in the instant case, applied the wrong standard of review of the factual sufficiency issue asserted by the Appellant. *See Cain,* 1997 Tex. Crim. App. Lexis 113 at 19.

The decision of this Court in *Cain* was not published until after Appellant had filed his Petition for Discretionary Review in this Court and, thus, said opinion was not available for consideration by the court of appeals and was not available for presentation to this Court at that time.

In at least one recent factual sufficiency case this Court has granted Petition for Discretionary Review and remanded the case to the appellate court in El Paso for further review in light of a recent decision of this Court not previously considered by

the appellate court. *See Blanco v. State,* 1998 Tex. Crim. App. Lexis 20, 5 (Tex. Crim. App. 1998).

A reconsideration of Appellant's factual sufficiency issue under the proper standard of review will produce a different result in the court of appeals as no evidence is in the record to support the contention that Appellant had the requisite intent to defraud or knowledge that there was insufficient funds to in the bank to cover the checks in question when written.

Justice requires reconsideration of the issue by this Court as the application of an improper standard of review by the appellate court violates Appellant's due process and due course of law protections as provided for by the United States and Texas Constitutions respectively.

## PRAYER

WHEREFORE PREMISES CONSIDERED, Appellant respectfully prays that this honorable Court grant a rehearing of Appellant's Petition for Discretionary Review, grant the Petition for Discretionary Review, and reverse the opinion of the Court of Appeals for the Eight Supreme Judicial District of Texas in this cause and render an opinion consistent with Texas Law, or in the alternative, remand this case for further proceedings consistent with the opinion of this Court, and, for any other relief, specific or general, at law or in equity, to which he may show himself justly entitled and for which he shall forever pray.

Respectfully submitted,

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By: /s/ Justin W. Low
Justin W. Low
State Bar No.: 00794195
Attorney for Appellant

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served in accordance with the Texas Rules of Appellate Procedure on this 11th day of March, 1998, by certified mail return receipt requested on the following:

State Prosecuting Attorney
P. 0. Box 12405
Austin, Texas 78711

Mr. Russell Malm
Midland County District Attorney
200 W. Wall
Midland, Texas 79701

/s/ Justin W. Low